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No. 250

In the

Supreme Court of the United States

October Term, 1959

ROBERT GOULD d/b/a ROBERT GOULD COMPANY

Petitioner,

IRVING H. LAKE, ROSARIO BARONE, THOMAS BEACHY, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

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No. ———

ROBERT GOULD, d/b/a ROBERT GOULD COMPANY,

Petitioner,

v.

IRVING H. LAKE, ROSARIO BARONE, THOMAS BEACHY, ET ALII.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 23, 1959, (Petition for rehearing denied on May 26, 1959) affirming a judgment of the United States District Court for the Southern District of Illinois, Northern Division.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 266 Fed. (2) 249 and is printed in the Appendix hereto, marked Exhibit A.

No opinion of the District Court is reported. Its findings of fact and conclusions of law, filed June 2, 1955, and its

further findings of fact and conclusions of law, filed November 5, 1957, together with its Decree, filed November 5, 1957, are printed on pages 15-44 of Volume 1 of the record as printed for use of the Court of Appeals[1] (nine copies of which record are filed herewith).

An underlying opinion of the Court of Appeals, filed May 13, 1944, but never reviewed by this Court, is reported in 142 Fed.(2d) 544 (Appendix, Exhibit B). Since it is necessarily the basis for the later proceedings, this Court is invited to review it as well, and for that purpose a certified copy of the record of that earlier matter in the Court of Appeals is also filed herewith.

No opinion of the District Court was reported with respect to its decree reversed by the Court of Appeals in 142 Fed.(2) 544, but its findings of fact and conclusions of law, filed March 9, 1943, and its Decree, filed April 14, 1943, are printed in the Appendix hereto (with deletion from the decree of lengthy lists of names and figures not here material) and marked Exhibits C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals was dated and entered April 23, 1959.

The Order of the Court of Appeals denying a rehearing was dated May 26, 1959.

The jurisdiction of this Court is invoked under *Sec. 1254 (1), Title 28, U.S.C.A.* which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

[1] Reference thereto will be indicated thus: (Vol. 1 R. 15-44)

QUESTIONS PRESENTED

In September, 1940, the Petitioner, Robert Gould (hereinafter called "Gould") at a public sale held by the New York State Tax Commission in Brooklyn, New York, bought all of the right, title and interest of Kent-Darby, Ltd. in (A) warehouse receipts for (among others) 494 barrels of whiskey in the warehouses of Hiram Walker & Sons, Inc. or one of its affiliated or subsidiary organizations (hereinafter called "Hiram Walker"), and (B) a contract or warrant to purchase 1367 barrels of whiskey from Hiram Walker on which some $12,000 had been paid and some $33,000 remained to be paid, subject to all outstanding equities whatsoever.

Thereafter, some 200 or more persons (hereinafter called the "tavern keepers") notified Hiram Walker that they had claims to the whiskey and Hiram Walker refused to turn the whiskey over to Gould upon his tender of the warehouse receipts and of the balance of the contract price and all other proper charges. Gould sued Hiram Walker for possession of the whiskey in the District Court in March, 1941, and in its counter-claim Hiram Walker interpleaded the tavern keepers. The real contest was then, and is now, between Gould and the tavernkeepers who are the Respondents in this petition. In April, 1943, the District Court decreed that Gould's right to the whiskey was superior to that of the tavern keepers (Appendix, Exhibits C and D).

In April, 1943, Gould took constructive possession of the whiskey in barrels from Hiram Walker in Illinois and disposed of it (Vol. 1, R. 19, Finding 11) through sale of the warehouse receipts

Thereafter the tavern keepers appealed and on May 13, 1944, the Court of Appeals reversed the District Court and held that Gould took title to the Whiskey at the New York tax sale "subject to the claims" of the tavern keepers.

It remanded the case with directions to proceed in accord with its Opinion (142 Fed. (2) 544; Appendix Exhibit B).

After a long delay (Vol. 1, R. 65) during which the first District Judge in the case died (Vol. 1, R. 64), the District Court awarded money judgments in varying amounts in favor of the tavern keepers against Gould on November 5, 1957 (Vol. 1, R. 39-44) aggregating, with costs, $112,703.32. The Court of Appeals affirmed (266 Fed. (2) 249; Appendix Exhibit A).

The measure of damages applied by the District Court and affirmed by the Court of Appeals (after deducting fixed charges) was the market ceiling price fixed by law (OPA) of whiskey in *bottles* prevailing in April, 1943, when Gould took possession of the whiskey in *barrels*. If the measure of damages had been the market ceiling price fixed by law (OPA) (deducting the same fixed charges) of whiskey in *barrels* as of the same time, the judgments (with costs) against Gould would have aggregated $45,436.82 — a difference of $67,266.50.

The separate OPA market value as of April, 1943 (after deduction of fixed charges) of the whiskey in barrels and the same whiskey in bottles have been stipulated by the parties (Vol. II, R. 25-47, being Columns 12 and 13 in the exhibit there contained).

Since the real, actual and practical effect of Gould's taking possession and control of the whiskey in barrels in Illinois in April, 1943, was a conversion of the same to his own use, the first question presented by this Petition is:

1. Should not the Court of Appeals and the District Court have followed the law of Illinois (that the measure of damages for conversion of personal property is the value of the property at the time of the conversion) and assessed damages at the value of the whiskey in *barrels* as of April, 1943, instead of in *bottles*?

Since the decisions below necessarily relate back to April, 1943 and since the net effect of those decisions is to compel Gould to pay for whiskey in barrels at the *then* price of whiskey in bottles, which was greatly in excess of the OPA ceiling price of whiskey in barrels, the second question presented by this Petition is:

> 2. Is not the measure of damages applied in the decision below improper as a retroactive sanction of a price for whiskey in barrels which would have been a violation of O.P.A. price regulations in April, 1943?

STATUTES INVOLVED

Section 1652, Title 28, U.S.C.A. (June 25, 1948, c. 646, 62 Stat. 944) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

Some nineteen years ago, on September 19, 1940, Petitioner, Robert Gould (hereinafter called "Gould") at a public sale held by the New York State Tax Commission in Brooklyn, New York, bought all the right, title and interest of a New York concern called Kent-Darby, Ltd. formerly known as Pennsylvania Whiskey Distributing Co. (hereinafter for brevity "Kent-Darby" regardless of the name at any time used) in and to (A) warehouse receipts for (among others) 494 barrels of bulk (as distinguished from bottled) whiskey in the Internal Revenue Bonded warehouses of Hiram Walker & Sons, Inc., or an affiliate or subsidiary o fthat company, (hereinafter "Hiram Walker");

and (B) a contract or warrant of Kent-Darby to purchase 1367 barrels of bulk whiskey from Hiram Walker on which some $12,000 had been paid and some $33,000 remained to be paid, all subject, by the terms of the sale, to all outstanding equities whatsoever.

Gould paid some $30,000 at the sale without actual knowledge of any claims against the whiskey except in favor of Hiram Walker for storage, insurance, local taxes, etc., on all of the whiskey, plus the unpaid balance of the contract or warrant price on the 1367 barrels described in Clause (B) in the preceding paragraph. Hiram Walker indicated that it would deliver the whiskey to Gould upon payment of such sums as soon as the proper entries and papers could be made out. Prior to that time (but, of course, subsequent to the Tax sale to Gould) upwards of two hundred persons filed notice of claims against or to the whiskey with Hiram Walker.

Those claims were all similar in origin and nature and arose in this way: For a purchase price, Kent-Darby would issue its "certificate" for a specified number of barrels of the aforementioned whiskey to a purchaser (hereinafter collectively called "tavernkeepers") deliverable upon surrender of that certificate *but only after being bottled by Kent-Darby* and the payment by the tavernkeepers of certain specified taxes and charges. Title was to pass upon full payment of the purchase price and from the date of the "certificate" the whiskey was at the tavernkeeper's risk of loss of fire, theft, etc. (A copy of one of these certificates will be found on pages 35 et seq of the transcript of the record in the *original* case (No. 8415) in the Court of Appeals, one certified copy of which is filed with this petition). These certificates in the hands of the tavernkeepers had been issued at various dates as far back as three years or more prior to the September, 1940, Tax sale to Gould.

Hiram Walker, having received notice of these tavernkeepers' claims to the whiskey subsequent to the Tax sale to Gould, refused to deliver the whiskey to him upon tender of the sums due it o. the Kent-Darby contract plus the taxes, storage and other charges. Gould sued Hiram Walker for possession of the whiskey in the United States District Court for the Southern District of Illinois, Northern Division, in March, 1941. Hiram Walker counterclaimed for interpleader and interpleaded the tavernkeepers. From that time the real controversy was, and is now, between Petitioner, Robert Gould, and Respondents, the tavernkeepers. In April, 1943, the District Court decreed that Gould's right to the whiskey was superior to the claims of the tavernkeepers (Appendix Exhibits C and D) and in April, 1943, Gould took possession and control of the whiskey in Illinois from Hiram Walker *in barrels* and disposed of it (Vol. 1, R. 19, Finding 11).

Thereafter the tavernkeepers appealed to the United States Circuit Court of Appeals for the Seventh Circuit and on May 13, 1944, that Court reversed the District Court and held that Gould took title to the whiskey at the New York tax sale "*subject to the claims*" of the tavernkeepers. It remanded the case with directions to proceed in accord with its Opinion but it did not otherwise define or elaborate upon the "claims" of the tavernkeepers (142 Fed. (2) 544; Appendix Exhibit B).

After a long delay (1944-1957) for which the District Judge ventured the opinion that all parties were responsible (Vol. 1, R. 65) and during which the original District Judge in the case had died (Vol. 1, R. 64), the District Court awarded money judgments in varying amounts in favor of the tavernkeepers against Gould on November 5, 1957, (Vol. 1, R. 39-44) aggregating with costs $112,703.32. The Court of Appeals affirmed on April 23, 1959 (266 Fed. (2) 249; Appendix Exhibit A).

In April, 1943, when Gould took possession and control of the whiskey from Hiram Walker in barrels, the market values of whiskey were such as were fixed and published by law as ceiling prices under O.P.A. regulations. For purposes of these legally fixed market ceiling prices then prevailing, whiskey in barrels was a separate commodity from whiskey in bottles, the latter having an O.P.A. market ceiling something over twice that of the former. After determining the deductions applicable in each case for the fixed charges, the separate O.P.A. market values as of April, 1943 (when Gould took possession and control of the whiskey in barrels from Hiram Walker) of whiskey in barrels and the same whiskey in bottles have been stipulated by the parties (Vol. II, R. 25-47, being Columns 12 and 13 in the exhibit there contained).

The measure of damages applied by the District Court and affirmed by the Court of Appeals (after deducting the fixed charges) was the O.P.A. market ceiling price of whiskey in *bottles* prevailing at the time when Gould took possession and control of the whiskey in *barrels* (in April, 1943). If the measure of damages applied had been the O.P.A. market ceiling price of whiskey in barrels prevailing at that time, the judgments (with costs) against Gould would have aggregated some $45,436.82 instead of $112,703.32 — a difference of some $67,226.50.

The sole basis for federal jurisdiction in the District Court was diversity of citizenship between the parties plus the requisite amount involved exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Failed to Follow The Law of The State in A Diversity Case And Is Thereby in Conflict With Applicable Decisions of This Court And Other Courts of Appeal on That Point.

The sole basis for the federal jurisdiction in the case under consideration was diversity of citizenship. With respect to such cases it has been the undoubted rule since 1938 that the law to be applied is the law of the State. In *Erie R. Co.* v. *Tompkins* (1938) 304 U.S. 64 this Court said (78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in *any* case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is *no* federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal *courts*."

In *Commissioner of Int. Rev.* v. *Stern* (1958) 357 U.S. 39, this Court said (45):

> "In diversity cases, the federal courts must now apply state decisional law in defining state-created rights, obligations, and liabilities"

and in *Guaranty Trust Co.* v. *York* (1945) 326 U.S. 99, this Court said that a federal court adjudicating a state-created right solely because of diversity (108):

> ". . . is for that purpose, in effect, only another court of the State . . ."

Included in the law of the State which a federal court must apply to a case before it solely on diversity of citizenship is the law of the measure of damages. In *Vanity Fair Mills* v. *T. Eaton Co.* (1956 C.A. 2) 234 Fed. (2) 633, cert. den. 352, U.S. 871, it was said (639):

> "The creation and *extent* of tort liability is governed according to the usual rule, by the law of the place where the alleged tort was committed."

Sec. 412 Restatement of Conflict of Laws (1934) says:

> "The measure of damages for a tort is determined by the law of the place of the wrong."

In *Coca-Cola Co.* v. *Dixi-Cola Laboratories* (1946 C.A. 4) 155 Fed. (2) 59, cert. den. 329 U.S. 773, involving an action of unfair competition in a federal court in Maryland, it was held that, as regards the liability of the defendants *and* the measure of damages in each instance (67):

> "The law to be applied is the law of Maryland . . . including the conflict of laws rule prevailing in the State . . . that is to say, we should apply the law of Maryland or the laws of the states where the wrong doing occurred just as a Maryland court would do if the case were before it."

In *Knecht* v. *United States* (1956 D.C. Pa. E.D.) 144 F. Supp. 786, aff'd. (1957 C.A. 3) 242 Fed. (2) 929, the District Court said (790):

> "The measure of damages recoverable in a tort action is governed by the law of the place where the cause of action arose and not by the choice of the forum."

and in *Hupp Motor Car Corp.* v. *Wadsworth* (1940 C.A. 6) 113 Fed. (2) 827 (829):

> "The measure of damages in an action for tort is determined by the law of the state where the tort was committed."

When Gould took possession and control of the whiskey from Hiram Walker in barrels in Illinois in April, 1943 (Vol. 1, R. 19 Finding 11) it amounted practically, if not technically, to a conversion of personal property so far as the tavernkeepers were concerned. We phrase it this way because it must be remembered that Gould took the whiskey in barrels from Hiram Walker (not from the tavernkeepers) and because for two reasons the tavernkeepers themselves had no immediate right of possession to the whiskey, (1) because under Federal laws the tavernkeepers as retailers were not permitted to receive whiskey in barrels (Vol. 1, R. 21 Finding No. 14); and (2) because the unpaid charges with respect to taxes, insurance, storage, etc., were over $200.00 per barrel of the whiskey (Vol. II, R. 4, Par. 9). Although Gould took possession of the barrels pursuant to order of the District Court (Appendix, Exhibit C, Conclusion 9) yet for purposes of ascertaining the tavernkeepers' damages, it resembles a conversion of personalty and it is submitted that the only proper measure of damages is the measure of damages applicable under the law of Illinois in such cases. Bear in mind, too, that the record does not disclose evidence of any *special* damage by way of destruction or interruption or loss of business, or expense, suffered or incurred by the tavernkeepers or any of them by reason of Gould's taking of the whiskey in barrels in April, 1943. We believe the following cases state the law of Illinois as to the measure of damages which should have been applied by the Courts below to determine Gould's liability to the tavernkeepers. The case of *National Bank of the Republic* v. *Wells-Jackson Corp'n et al* (1934) 358 Ill. 356, 193 N.E. 215, 98

A.L.R. 618, was, like the case at bar, an equity case and not primarily a suit for conversion. In that case McKinlock was lessor in a 99 year lease which had been assigned by the original lessee to Wells-Jackson. Wells-Jackson entered into a contract with Phillips Co. whereby Phillips Co. installed a sprinkler system in the building for some $46,000, payable in installments, with title to the sprinkler system remaining in Phillips Co. pending full payment, and further providing that until full payment the sprinkler system should not be a fixture but remain personal property with the right in Phillips Co. to repossess it upon default in payment. Wells-Jackson defaulted in the lease and McKinlock terminated it and took possession of the building including the sprinkling system which he refused to turn over to Phillips Co. Phillips Co. then prayed that McKinlock be required to pay Phillips Co. the *balance due it* for the sprinkler system under its contract with Wells-Jackson. The trial court decreed that McKinlock had title to the leased premises including the sprinkler system free and clear of all claims including that of Phillips Co. Phillips Co. appealed and the Appellate Court affirmed the trial court. The Supreme Court of Illinois granted certiorari and upon hearing reversed the lower courts. It said (Pages 220 and 221 of 193 N.E.):

> "The evidence clearly establishes that McKinlock has converted the sprinkler system to his own use. There remains in the case only the question of the amount of damages for which the plaintiff in error (Phillips Co.) shall have a decree against McKinlock. It is contended by the plaintiff in error that it is entitled to a money decree against McKinlock for the balance due, with interest, on the purchase price of the sprinkler system. We do not agree with that contention. McKinlock is *not* liable upon the contract between Phillips Co. and the Wells-Jackson Corp. for

> the balance of the purchase price, but his liability to the plaintiff in error is because of his conversion of the property of the plaintiff in error. *The measure of damages for conversion of personal property is the value of the property at the time of conversion.*" (Citing other Illinois cases.)

As in the foregoing case McKinlock was not liable upon the contract between Phillips Co. and Wells-Jackson, so in the case at hand Gould was not liable on the contracts between Kent-Darby and the tavernkeepers. Yet instead of giving the tavernkeepers judgments for the value of the whiskey *in barrels* at the time Gould converted it to his own use, the District Court awarded, and the Court of Appeals affirmed, damages to the tavernkeepers as though Gould had converted *whiskey in bottles* or, in other words, as though Gould was liable to them on their Kent-Darby contracts, and they had sued him for default thereon.

In *AA Excavating Co.* v. *First United Finance Corp.* (1944) 321 Ill. App. 309, 52 N.E.(2) 837, it was held that in an action for conversion (of excavation equipment) the true measure of damages ordinarily is the value of the property at the time of the conversion with interest and it was error for the court to instruct that the jury might also consider what the reasonable rent for the equipment would be during the time it was wrongfully detained.

Gould purchased barrels at the tax sale. Gould took possession of barrels. Gould sold the whiskey in barrels. Gould was not obligated to perform the Kent-Darby promise to deliver bottled whiskey, yet the damages awarded here are tantamount to such a requirement.

Klimas v. *Klimas* (1953) 349 Ill. App. 243, 110 N.E. (2) 463, is to like effect with respect to household goods converted.

Nor does the fact that the value of the converted property increases between the time of conversion and the date of trial appear to alter the Illinois rule. In *Sturges v. Keith* (1870 Sup. Ct. of Ill.) 57 Ill. 451, 11 Amer. Rpts. 28, the conversion of railroad shares occurred in January, 1865 when the value was $93 per share. At the time of the trial in October, 1868, the value was $151.50 per share. Under the court's instructions the jury brought in a verdict based upon the value at the time of trial. The Supreme Court of Illinois reversed and in the course of its opinion said:

> ". . . a majority of the Court adhere to the general, well established rule in this State, viz.: that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion with interest . . . and recognize no exception where the property converted happens to be stocks."

The case is a venerable one but it is cited in *53 Amer. Jur. 890* (Sec. 98 "Trover and Conversion"), which was published in 1945, in support of the text that:

> "The value as of the time of the conversion has been taken as the proper standard to be applied notwithstanding the subsequent increase in value."

The case is also cited in *40 A.L.R. 1304* (1926) in a study of some cases denying the right to damages for increase in value of property after conversion. At this point we depart from the Illinois cases (although the Illinois law is the law of decision) long enough to mention the substance of a New York case as expressed in Syllabus 4 in *Palestine Hebrew Wine Co. v. Terminal Warehouse Co.* (1910) 67 Misc. Rpt. 456, 123 N.Y.S. 346.

> "If wine stored by plaintiff in a warehouse in barrels was converted, plaintiff's measure of damages would be the value of the wine in bulk as stored, and not its value after payment of the duty, bottling, labeling, and packing in cases."

No amount of rationalization can change the facts that:

(a) the whiskey taken by Gould in April, 1943, was whiskey in barrels;

(b) whiskey in barrels at that time had its own market value as fixed, determined and published by law in the form of the then existing O.P.A. regulations applying specifically to whiskey in barrels;

(c) the parties have stipulated the separate O.P.A. market values of the whiskey involved both in barrels and in bottles (less fixed charges applicable to both) as of April, 1943, and the market value of the whiskey in bottles was over twice that of whiskey in barrels (Vol. II, R. 33-47, Columns 12 and 13).

It was certainly not Gould's fault that Kent-Darby failed to perform its contracts with the tavernkeepers. Gould was a licensed broker of warehouse receipts for distilled spirits in bulk or barrel form. Gould had no interest directly or indirectly in Kent-Darby. He did not enter the picture until he became the "successful" bidder at the New York State Tax Sale of the warehouse receipts and the contract for whiskey in barrels. It is equally certain that it was not Gould's obligation to fulfill those contracts in the place of Kent-Darby. Yet that is certainly the position in which the decree of the District Court and its affirmance by the Court of Appeals have placed Gould by failing to apply the law of Illinois as to the measure of damages.

2. The Reason Why Certiorari Was Granted in ERIE v. TOMPKINS Is The Reason Why Certiorari Should Be Granted in This Case.

In *Erie R. Co.* v. *Tompkins* (1938) 304 U.S. 64, this Court said (71):

> "Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari."

That, too, was a tort case lodged in the federal court by reason of diversity of citizenship. The reason stated for granting certiorari in that case could be re-stated thus in the case at hand:

> ". . . the question whether the federal court was free to disregard the alleged rule of the *Illinois* common law . . ."

3. The Practical Effect of The Decisions Below, Is to Sanction A Price for Whiskey in Barrels Which, when Related Back to April, 1943, Is Higher Than The Then Legally Permitted Price for Same.

Giving due effect to substance over form, it is submitted that the practical and substantial effect of the decisions below, relating back, as they must, to the time of Gould's taking of the whiskey in barrels in April, 1943, is that Gould pays the tavernkeepers for whiskey in barrels at a price higher than the then legally permitted market price for same. The tavernkeepers in April, 1943, could not lawfully have sold these barrels of whiskey to Gould for the sums which the lower courts have decreed he must pay the tavernkeepers for them. And yet whether by voluntary sale or by the effect of the decrees below the end result is the same — Gould has the whiskey and the tavernkeepers have (or will have) the money. Under these circumstances and from a practical viewpoint does it not appear that by failing to apply the Illinois measure of damages the lower Courts have, in substance, judicially sanctioned a transfer of whiskey in barrels in 1943 for a sum or sums which, when related back to 1943, exceed by far the ceiling price fixed by law at which whiskey in barrels then could have changed hands?

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

Note: In accord with Rule 23(1)(i) of the Supreme Court, the Decree of the District Court entered Nov. 5, 1957, and its Findings and Conclusions and its Further Findings and Conclusions are omitted. They appear on pages 15-44 of Vol. 1 of the record as printed for use of the Court of Appeals, nine copies of which are filed with this petition.

EXHIBIT "A"

OPINION OF UNITED STATES COURT OF APPEALS

For the Seventh Circuit

(April 23, 1959) (266 Fed.(2) 249)

(Caption Omitted)

Before SCHNACKENBERG, PARKINSON AND KNOCH, *Circuit Judges.*

KNOCH, *Circuit Judge.* On September 19, 1940, at a New York Tax Commission Warrant Agent's sale, Robert Gould purchased, subject to prior sales and outstanding equities, all the right, title and interest of Pennsylvania Whiskey Distributing Corporation (later known as Kent-Darby, Ltd.) herein called "Pennsylvania", in (inter alia) a contract to purchase 1,367 barrels of whiskey from the Hiram Walker Companies, herein called "Walker", on which partial payment had been made and, in addition, warehouse receipts representing 833 barrels of whiskey. Of the total 2200 barrels only 1608 are involved in the matter now before us.

In 1941 Gould brought this action to compel delivery by Walker upon payment by Gould of charges for storage, insurance, taxes, and the balance due on the purchase contract. Walker answered Gould's demand alleging the receipt of notices of other claims from the numerous interpleaded counter-defendants (herein called "Tavern Keepers") each based on alleged prior purchases of the whiskey in question from Pennsylvania.

It was stipulated that prior to September 1940, Pennsylvania sold each of the Tavern Keepers varying numbers of barrels of whiskey; and that in each instance a part, at least, of the agreed purchase price had been paid Pennsylvania. Specific proof of the exact agreed prices and amount of payment made was reserved for later accounting.

Gould contended that he had acquired the entire legal and equitable title to the whiskey and that, as a matter of law, he took subject only to payment of the unpaid balance of the purchase price, and equities of which he had legal notice at the time of his purchase.

The only contested issue at that time was whether he took subject to or free from the rights of Tavern Keepers

On appeal, this Court (142 F. 2d 511, 1944) concluded that Gould took title subject to the claims of the Tavern Keepers and remanded the cause to the District Court for further proceedings consistent with that finding.

The parties then stipulated as to the amounts paid by each Tavern Keeper and the number of barrels covered by each payment.

However, under authorization of the District Court's decree of April 14, 1943 (subsequently reversed on appeal as heretofore indicated) Gould had taken delivery and disposed of the whiskey. It thus became the duty of the District Court to assess damages.

The Tavern Keepers were all retailers, not blenders or distillers of liquor. Under the law they were prohibited from accepting delivery in barrels and could do so only in bottled form. Damages were assessed by the District Court on the basis of the wholesale value of each barrel of whiskey in bottled form, less all amounts payable as contract balances, storage and other charges, Federal Excise Taxes, and cost of bottling.

An exception was made of two Tavern Keepers who were found not to have paid Pennsylvania the full amount of their agreed purchase price. They were awarded solely the return of the amounts they had paid.

Gould asserts that all the Tavern Keepers should have been awarded damages solely in return of the amounts they had paid. His theory is that all were technically in default in completing payments and were tardy in asserting their rights. Gould argues that each Tavern Keeper should receive only the amount he actually paid, less an allocable share of the payments made by Gould to "protect" the property.

The whiskey would have been deliverable to the Tavern Keepers only after Pennsylvania had paid the Federal Excise Taxes, bottled the whiskey and been reimbursed for its cost. Gould thus contends that the Tavern Keepers owed Pennsylvania about $200 per barrel. This is about what would have been owed to Pennsylvania, had Pennsylvania paid the Federal Excise Taxes, Walker's charges for storage and insurance, shipping charges and bottling cost, and delivered the whiskey to the Tavern Keepers in bottled form. These things, however, were not done. In computing the value of each of the barrels, in bottled form, the District Judge gave full consideration to all these charges which the Tavern Keepers would have had to pay Pennsylvania at such time as they sought delivery of their whiskey in bottled form from Pennsylvania.

It was undisputed that for some time prior and subsequent to April, 1943, when Gould took possession of the whiskey, war conditions caused a great imbalance in demand and supply of whiskey, production of which ceased during the war years. Further, because of the great price differential between Office of Price Administration "ceilings" for bulk whiskey and bottled whiskey, very little whiskey could be purchased in bulk. As a matter of self interest, owners of bulk whiskey had it bottled before sale to take advantage of the differential.

Thus the Tavern Keepers could not have purchased other whiskey in bulk in 1943 and had it bottled. They would have had to buy bottled whiskey at the higher prices then in effect.

Gould appeals on the ground that the District Court has made an unjust award of damages. The District Judge made no allowance for profit and based damages only on the differences between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, charges, etc., paid.

The Tavern Keepers have also appealed from the District Court's failure to allow interest. They contend that the measure of damages for conversion of personal property properly includes interest from the time of conversion.

Gould characterizes the interest of the Tavern Keepers as less than full ownership title. It is, however, unquestioned that Pennsylvania owned the warehouse receipt barrels outright (subject only to storage and insurance charges, etc.) and owned the contract barrels subject to such charges and balance of the purchase price due Walker. Purchase orders were signed by each Tavern Keeper. Penn-

sylvania issued each Tavern Keeper a whiskey warehouse certificate to evidence his interest. The purchase orders stated:

> "Title to the whiskey described in this order and covered by Warehouse Certificate shall remain in seller until payment of purchase price and any notes in connection therewith have been paid. . . ."

The certificates also provided:

> "The title to the whiskey covered by this certificate shall pass only upon full payment of the purchase price both in cash and the payment of any notes that shall be given in connection with the purchase price."

The certificates did not specify the agreed purchase price. The purchase orders did.

With the exception of two Tavern Keepers, who had not paid the full purchase price, as noted above, each Tavern Keeper, prior to the New York Tax Sale, paid Pennsylvania in full the purchase price set forth in the purchase order, and title to the bulk whiskey had passed from Pennsylvania to the respective Tavern Keepers. Gould, in acquiring Pennsylvania's right, title and interest at the Tax Sale acquired no title in the barrels of whiskey specified in the purchase orders of these Tavern Keepers.

Gould argues that something remained to be done to put the whiskey in a deliverable state, and that title therefore did not pass until the whiskey was bottled.

He quotes from Section 19 of the Uniform Sales Act, Rule 2 (Chapter 121½, Sec. 19, Illinois Revised Statutes):

> "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done."

However, the rules from which Gould quotes are preceded by an introductory paragraph:

> "Unless a different intention appears the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

and the preceding section (Sec. 18) provides:

> "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.
>
> "(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

Title may pass before delivery if the parties so intend (Sec. 34).

Here the provisions in the purchase orders and certificates with reference to delivery after bottling did not set the time for passage of the title, but represented an attempt to comply with the federal regulations prohibiting delivery of whiskey in bulk to unauthorized persons.

In *Kahn* v. *Rosenstiel*, S.D., N.Y., 1924, 298 Fed. 656 (cited by Gould) plaintiff's assignor contracted to buy cases of whiskey bottled in bond, f.o.b. At the time of the contract, both buyer and seller had permits to buy and sell, respectively, which were subsequently found to be void. The buyer sought to recover his down payment. The Court held that until the contract was performed, there should be a *locus poenitentiae*, and found the contract unexecuted. The Court said (page 657) that the parties do not presumptively mean to pass title till the seller has finished his part of the performance, which there required

the seller to bottle and ship the whiskey in cases bottled in bond.

In the case before us, as we construe it, when Pennsylvania went out of business, the Tavern Keepers, having full title, could have taken the whiskey stored in Walker's warehouses (on payment of Walker's charges, etc.) and had the warehouseman bottle it for them, at their expense, or had it delivered to one authorized to receive whiskey in bulk.

Gould also cites *Ely & Walker Dry Goods Co. v. Adams Mfg. Co.*, 2nd Cir., 1939, 105 F. 2d 906, which we do not find helpful. A creditor sought delivery of netting in possession of a trustee in bankruptcy. The Court found (page 908) that the creditor's purchase order and payment in advance, was a contract to sell future goods by description, to be manufactured or acquired by seller after making the contract to sell, and that the title did not pass until goods answering the description were unconditionally appropriated to the contract, put up and ticketed as described in the contract. The netting found on the premises of the bankrupt had not been so appropriated, put up, or ticketed.

Gould denies that Tavern Keepers had a right to possession on which a claim of conversion can be based, citing *British-American Tobacco Co., Ltd., v. Federal Reserve Bank of N. Y.*, 2nd Cir., 1939, 105 F. 2d 935; and *The Union Stock Yard Co. v. Mallory, etc., Co.*, 1895, 157 Ill. 554. Both are distinguishable on facts.

In the *British-American* case, the Court held that it was not conversion when the Federal Reserve Bank refused to turn over gold bullion to an owner who would be required, by statute and executive order, to return it at once.

The *Stock Yard* case concerned Samuel Fleischman, a cattle buyer, long an agent for Bussell, a Detroit pur-

chaser, who customarily bought on letter or wire instructions which came to Fleischman from Detroit. Zimmerman, of Mallory, Son & Zimmerman Co., with whom Fleischman negotiated, gave Fleischman an order on the Stock Yard Co. to deliver the cattle as instructed by Fleischman. Fleischman took the order and improperly resold the cattle to Holmes & Pattison. He endorsed the order: "To Holmes & Pattison. Bussell-S. Fleischman." When Bussell refused to pay for the cattle which he had never received, Mallory, Son & Zimmerman Co. sought to recover from the Stock Yard Co. The Court, in reversing and remanding for error in instructing the jury, said (page 570) that it was not conversion if a bailee, entrusted with possession merely, transferred possession according to the directions of the person from whom he received it.

One whose property is taken under a court order is entitled to restitution if the order is later reversed. Having sold the property erroneously awarded him, Gould must account for its value. *The Bank of the United States* v. *The Bank of Washington* (1832) 31 U. S. 8; *Ure* v. *Ure* (1906) 223 Ill. 454; *Hayes* v. *Cassell* (1873) 70 Ill. 669.

The market value or cost to a retailer of one barrel of whiskey in bottles in April, 1943, has been stipulated. The Court deducted therefrom the various amounts of taxes, bottling cost, storage charges, etc., which the Tavern Keepers would have had to pay to secure delivery of their own whiskey in bottles.

We cannot agree that damages as computed by the District Court contain contingent or speculative elements. In the conduct of their business the Tavern Keepers could sell bottled whiskey only. It would be unrealistic to assume that when whiskey was in short supply they would have sold it in bulk to a distiller at the proportionately low O.P.A. ceiling price for bulk whiskey rather than have

it bottled (for which facilities were available in the vicinity) for use in their business. As bulk whiskey was not readily available the case before us differs from that in *Illinois Central R. Co.* v. *Crail*, 1930, 281 U. S. 57, cited by Gould. That case concerned failure to make delivery of part of a carload shipment of coal. The buyer had lost no sales and purchased no coal at retail to replace the shortage. The Court of Appeals for the Eighth Circuit reversed judgment for the wholesale value of the coal, holding that judgment should have been entered for the retail value of the coal shortage as it was less than a carload in quantity. The Supreme Court, however, said (page 63) that recovery should be for the actual loss, damage or injury only.

It appears to us that the District Court in the case before us gave judgment for no more than the full actual loss shown.

Gould contends that the Tavern Keepers are not entitled to interest under the Illinois Interest Act because of the unliquidated nature of their claims and because this is not a true case of conversion as the Tavern Keepers had no immediate right to possession because of the Federal Bottling Requirements. The Tavern Keepers concede that this would be true at law, but assert that this is a case in which equity should allow interest. Cases cited in support of their contention, however, dealt with fraud, a wilful attempt to avoid a clear obligation, breach of trust, and waste committed on farm lands, none of which occurred here.[1]

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[1] *Duncan* v. *Dazey*, 1925, 318 Ill. 500 (title to property acquired by fraud); *Groome* v. *Freyn Engineering Co.*, 1940, 374 Ill. 113 (written contract providing time of payment of commissions coincided with time money was received by appellant); *Lebold* v. *Inland Steel Co.*, 7 Cir., 1942, 125 F. 2d 369 (a majority stockholder "dissolved" a corporation to appropriate the corporation's business entirely to itself, to the detriment of minority stockholders); *Lytle* v. *Fayette-Oregon Slope Irrig. Dist.*, Ore., 1944, 152 P. 2d 934 (waste on farm lands during period of possession of purchaser under judicial sale for delinquent assessments later held void.)

In view of the entire record here, the District Court could well come to the conclusion that equity did not warrant allowance of interest in this matter.

We find no error in the judgment of the Court below.

AFFIRMED.

EXHIBIT "B"

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Entered May 13, 1944.)

GOULD, et al v. HIRAM WALKER & SONS, INC., et al.
ARPS et al. v. SAME.

No. 8415 — (142 Fed. (2) 544)

Before EVANS, SPARKS, AND KERNER, Circuit Judges.

EVANS, Circuit Judge.

This controversy arose in this manner. A New York Company[1] bought a large quantity of whiskey from the Hiram Walker Company, and possessed warehouse receipts for some of it, and a contract to purchase the balance of this stock. The New York Company sold "interests" in the whiskey to hundreds of tavern keepers, received down payments therefor, and issued to them what is called "whiskey warehouse certificates" to evidence such sales and such purchasers' interests. The New York Company became embarrassed financially and its assets were sold by the New York State Tax Commission in September, 1940. The sale was upon written notice.

[1] Pennsylvania Whiskey Distributing Co., later known as Kent-Darby, Ltd.

Plaintiff, Gould, was notified of the impending sale by the manager of the New York Company and he attended and was the highest bidder. The sale was made to him and he paid $30,000 for the 1861 barrels so sold. The auctioneer read the notice of sale in plaintiff's presence. He asserts that it was not until after the sale that he learned of these alleged prior equities, and that he could not have ascertained their existence had he inquired of the Hiram Walker Co., the possessor of the liquor. He contends that the equity holders were guilty of negligence in not asserting their claims or notifying the possessor of the liquor of their rights thereto.

Plaintiff instituted this suit in March, 1941, against Hiram Walker Company to recover possession of the 1861 barrels of whiskey thus purchased at the auction sale. The Hiram Walker Company answered, and filed a counter-claim, in the nature of an interpleader, setting up the fact that it held the whiskey, to which two adverse claims were being made; that it did not know who was the rightful claimant and that it was ready to abide the decision of the court. It alleged the auction sale, and the fact that over two hundred persons had filed with it, claims of interest in the whiskey. An answer by one counter-defendant (a holder of a whiskey warehouse certificate) was filed and it was stipulated that it stand for all the remaining counter-defendants.

The real contest is between plaintiff (Gould) and the counter-defendants who assert their right to, or a lien on, said whiskey.

The evidence consisted of the oral testimony of plaintiff and the depositions of an attorney for the New York Tax Commission, and for one of the certificate holders, who attended the sale.

The trial court made findings of fact and conclusions of law. It found, inter alia:

"That at no time prior to the completion of Gould's purchase at said Warrant Agent's sale, or prior to Gould's notice to the Walker Companies of his purchase of said warehouse receipts and warrants, and their acceptance of him as the purchaser and owner thereof, did either the Walker Companies or the said Robert Gould have any notice or knowledge of any rights or claims of any of the Counter-Defendants herein, unless as a matter of law, the statements contained in the Warrant Agent's Notice of Sale be held to be notice to Gould thereof."

"That (the N. Y. Company) * * * kept records in which were recorded the names and addresses of the inter-pleaded Counter-Defendants, and the fact that certificates had been issued to them by (the N. Y. Company), * * * and disclosed the payments which had been made by the Counter-Defendants on account thereof, but that at the time of the Warrant Agent's sale in Brooklyn, New York, those records were in the possession of the New York State Tax Commission in Albany, about 150 miles distant from the place of sale."

As conclusions of law it found:

"That the Warrant Agent's notice of sale did not constitute such a warning of possible claims of a nature, such as have been asserted by the Counter-Defendants herein, as to place upon a reasonable man any duty of making inquiry of any one other than the Walker Companies. * * *

"That Robert Gould, in purchasing the Hiram Walker Warehouse Receipts and Warrants at the Warrant Agent's sale, was an actual bona fide purchaser thereof for value and without notice of any claims of any of the Counter-Defendants.

"That the Counter-Defendants by their failure to ascertain whether negotiable warehouse receipts had been issued to evidence title to the whiskey in the Walker warehouses (which they thought they had purchased) or to ascertain who was the actual owner

of said whiskey, and in failing to notify the parties having the physical possession of said whiskey, namely the Walker Companies, of their claimed rights therein, prior to the Warrant Agent's sale, are estopped from asserting any claim equal to, or superior to, the right of Robert Gould.

"That the equities of this cause are with the said Robert Gould."

Important provisions of the notice of sale, the contract of sale, and the certificate of sale are set forth in the margin.[2]

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[2] "State Tax Commission of the State of New York

"Warrant Agent's Terms of Sale

"Re: Kent-Darby, Ltd.

"To Whom It May Concern, Greetings —

"1. By virtue of a warrant issued by the State Tax Commission of the State of New York, to me directed and delivered against the property of Kent-Darby, Ltd., I, the undersigned, Warrant Agent, do hereby offer for sale all the right, title and interest of said company in and to the following described property as set forth in a list annexed hereto and made part hereof • • •

"3. All descriptions and additional information concerning the property to be sold are not representations, but are merely statements for information of the bidders herein, and are not warranted or guaranteed by the undersigned. All sales are made 'as is'. No warranty as to the condition or the working order or capacity of any item, is made by the undersigned, nor as to the properties or serviceability of the merchandise sold.

"3A. All warehouse receipts, contracts, warrants, and other documents, and stock certificates, sold at this sale, are sold subject to all equities outstanding against them, including but not limited to, liens, claims, storage charges, mortgages, prior sales, variations or absence in quantity or quality of merchandise, • • • and any other equities or encumbrances whatsoever."

• • •

"Lot A. Some 815 Warehouse Receipts; • • • Certificates are sold subject to all equities.

• • •

"Lot C. A warrant or contract for 1367 barrels of Hiram Walker & Sons whiskey, in favor of Kent-Darby, Ltd., on which some $12,000 has been paid on account, and some $33,000 remains to be paid; subject to location in Peoria, Illinois and Lehigh Warehouse • • •

"All the foregoing to be sold subject to the terms of sale • • •

"Certificate of Sale.

"I, • • • Haff, a duly appointed warrant agent of the State Tax Commission • • • do hereby certify • • • I did • • • sell at public vendue unto • • • Robert Gould • • • all the right, title and interest

The evidence was sharply contradictory on only one issue. It covered an affidavit by an attorney for a warehouse certificate holder which stated that he attended the sale and before the sale told the warrant officer of his client's interest, and was by him told "the sale would make no difference to my client's rights because they were being sold subject to all outstanding claims and equities. Counsel was advised to take the matter up with whoever was the purchaser of the sale and try to arrange a release through him." Said attorney also stated he had talked with the manager of the New York Company at the sale; that plaintiff was present at this conversation; that he stated his client's interest in the whiskey; and asked to have it released from the sale, and the manager replied it was out of his hands and he would have to take it up with the purchaser at the sale.

This evidence was denied by Gould, who testified orally. Since the trial court found that Gould was a bona fide purchaser, and without actual knowledge of these pre-existing equities of the warehouse certificate holders, the controversy narrowed itself down to the terms in the notice of sale and the actual terms of the sale as stated by the auctioneer. Both the notice and the auctioneer's statement of what he was going to sell, stated the whiskey was offered for sale "subject to all equities outstanding" and subject to "prior sales."

The effect of such words determines this appeal.

(1) There are several persuasive reasons for holding, as a matter of law, that plaintiff took subject to the equities of the counter-defendants.

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of the said Judgment Debtor, Kent-Darby Ltd., of which it was seized or possessed on the 13th day of September, 1940 * * *

"Pursuant to the above terms (the first matter above quoted) the undersigned has purchased the items mentioned in schedule hereto annexed. * * *"

(1) The published notice and the auctioneer's announcement, both apprised the purchaser of the possible existence of superior equities or encumbrances. They expressly stated that only the interest of the New York Company was being transferred. The notice stated there would be a sale of "all the right, title and interest of the said Judgment Debtor"; and, again, "All * * * contracts * * * are sold subject to all equities outstanding against them, including but not limited to lien, * * *." A more restricted, guarded statement of what was being sold could hardly have been made. The notice also read, "All descriptions and additional information concerning the property to be sold are not representations, but are merely statements for information of the bidders herein, and are not warranted or guaranteed, * * * All sales are made 'as is'. No warranty as to the condition, or the working order or capacity of any item, is made * * *." The announcement was read by the auctioneer in the plaintiff's presence, while he was about ten feet away. He testified he had read the terms of the sale and the announcement of the sale in the newspaper.

(2) (2) The burden should be on the purchaser, where it is stated at the sale that no warranty is made, and that title is subject to all equities against the commodity, to investigate the condition of the property or title thereto, rather than on prior equity owners to search out the prospective bidders and warn them of their claims. A person buying at an auction, knowing that he is not receiving a guaranteed article or title has a duty to investigate to discover the precise status of the title he is buying and plaintiff seems to have made was as to the lack of a bank indorsement on the warehouse receipts. He made no

[3] Plaintiff's bid was, according to proffered evidence, not more than a fraction of the value of the whiskey.

inquiry of the tax warrant officer, or the senior attorney for the New York State Tax Commission, both of whom were at the sale, and who, the testimony disclosed, had either been approached by the attorney for a counter-defendant, or such defendants with a claim for release of the whiskey represented by their "certificates," or were in possession of the Company's books (at a place removed from the sale) which books reflected the purchase by each of these hundreds of tavern-keepers who had purchased some of the whiskey or made a down payment on an asserted sale. These counter-defendants, some of them, approached the state officials, and the manager of the company — the latter in the presence of plaintiff — and asked for the release of the whiskey which they had purchased.

(3) The attorney for one of the counter-defendants sought to apprise the officials of his client's claim and a release of his property, but was told the whiskey would be sold subject to his rights and he should consult the purchaser for a release. It is claimed that the certificate holders should have registered their claims with Hiram Walker Co. or taken possession of their property, which some of them had paid for in full, in order to protect their claims. But there is no evidence that the instant plaintiff made any attempt to contact Hiram Walker Co. or to find out the state of title of this property. He was not therefore misled by the failure of the counter-defendants to affirmatively act to protect their property. They, on the other hand, might well have been lulled into a sense of security by the notice and announcement that the property was to be sold subject to outstanding equities.

(4) This plaintiff knew of the practice of issuing whiskey certificates — he so testified:

> "Q. Had you ever seen certificate of that character that had been issued in the trade before?
>
> "A. Not of that character, no.

"Q. Of that general type. Have you seen certificates issued by a whiskey company which purchased either by contract or warehouse receipts from a distiller and sold out in general?

"A. Yes, I have.

"Q. You are familiar with that practice?

"A. Yes.

"Q. And you knew about that practice in general before you were there at the sale, is that right? I am talking about the general practice in the whiskey business?

"A. Yes, there was some practice of that type."

At another point in the evidence he was asked,

"Did you at any time make any inquiry of any kind, either before or after the sale, as to whether or not there were any prior sales of this whiskey or the documents?

"A. I did not."

As between the plaintiff and the counter-defendants, the stronger equities lay with the latter and this without weighing the factor that the price at which the plaintiff purchased was extremely low according to the proffered testimony.

The cases are numerous but many must be distinguished because of difference in facts. We cite a few which approach the instant case in their fact situations. They are helpful to appellants. Graham v. Healy, 154 App. Div. 76, 138 N.Y.S. 611; Burling v. Brinn, 116 Misc. 130, 189 N.Y.S. 707; Navarette v. Travis-Ziegler Co., Mun. Ct. 194 N.Y.S. 832; Alexander v. Sola, Sup., 185 N.Y.S. 869; Cottle v. Bd. of Supervisors, 57 App. Div. 443, 67 N.Y.S. 996; Lane v. Chantilly Corp., 251 N.Y. 435, 167 N.E. 578, 68 A.L.R. 653; Waples v. United States, 110 U.S. 630, 48 S. Ct. 225, 28 L. Ed. 272; Osterberg v. Union Trust Co., 93 U.S. 424, 23 L. Ed. 964; The Monte Allegre, 9 Wheat. 616, 22 U.S.

616, 6 L. Ed. 174; Hall v. McGehee, 5 Cir., 37 F. 2d 854; Smith's Lessee v. McCann, 24 How. 398, 16 L. Ed. 714; Osterman v. Baldwin, 6 Wall. 116, 18 L. Ed. 730; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. Ed. 199; see also Amer. Juris., "Auctions," Sec. 15, Sec. 46; Amer. Juris., "Judicial Sales," Secs. 167, 169, and Corpus Juris Secundum, Vol. 7, Auctions and Auctioneers, § 8, p. 1262.

We also cite cases from which appellee may derive comfort.[4]

Our conclusion is that appellee took title to the whiskey subject to claim of appellants, the so-called "counter-defendants."

The decree is reversed with directions to proceed in accordance with views expressed in this opinion.

KERNER, Circuit Judge (concurring).

The real question is whether the statements contained in the notice of sale constitute a warning of possible claims such as are asserted by the counter-defendants.

In sales of this description, a bidder is bound by the publicly proclaimed terms of the auction sale, Chandler v. Morey, 96 Ill. App. 278, affirmed 195 Ill. 596, 63 N.E. 512. He should not bid without ascertaining the terms upon which the property is being sold, Burling v. Brinn, 116 Misc. 130, 189 N.Y.S. 707, 709. There is no warranty of title. The quantity and quality of the title must be at the purchaser's risk. It is his privilege to be fully informed of the state of the title so that he may bid understandingly

[4] *Hunn* v. *Lewis*, 8 Cir., 25 F.2d 271; *Keefe* v. *Cropper*, 196 Iowa 1179, 194 N.W. 305; *Stevens Hardware Co.* v. *Bank of Bryomville*, 34 Ga. App. 268, 129 S.E. 172; *Pepin* v. *Stricklin*, 114 Cal. App 32, 299 P. 537; *McCoy* v. *Davis*, 38 N.D. 328, 164 N.W. 951; *Smith* v *Miller*, 296 Pa. 340, 145 A. 901; *Equitable Loan Co.* v. *Leuman*, 124 Ga. 190, 52 S.E. 599, 3 L.R.A., N.S. 879; *McNeil* v. *Tenth Nat. Bank*, 46 N.Y. 325, 7 Am. Rep., 341; *Commercial Nat. Bank* v. *Canal-Louisiana Co.*, 239 U.S. 520, 36 S. Ct. 194, 60 L. Ed. 417, Ann. Cas. 1917E, 25.

at the sale. Under the rule of caveat emptor it is incumbent upon the bidder, and not upon the officer conducting the sale, to determine the condition of the title, and if he bids, he does so with notice that he will take only whatever interest the execution debtor has in the property. Dorris v. Johnson, 363 Ill. 236, 2 N.E. 2d 74.

The notice of sale expressly stated that the sale would be subject to all outstanding equities. Under such circumstances the plaintiff purchased precisely the interest which the judgment debtor had in the property sold.

EXHIBIT "C"

IN THE
DISTRICT COURT OF THE UNITED STATES
Southern District of Illinois, Northern Division

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed March 9, 1943.)

1. That on September 19, 1940, W. P. W. Haff, as Warrant Agent of the New York State Tax Commission, offered for sale at public auction, as property seized by the Tax Commission, from Pennsylvania Whiskey Distributing Corporation (Kent-Darby Ltd.), the following:

LOT A.

Some 815 warehouse receipts, more or less, representing approximately 833 barrels of whiskey in bonded warehouses.

LOT B,

10 shares of common stock of Commonwealth and Southern Corporation as evidenced by No. X-20955, dated 5/13/30.

LOT C.

A warrant or contract for 1367 barrels of Hiram Walker & Sons whiskey in favor of Kent-Darby, Ltd., on which some $12,000.00 has been paid on account and some $33,000.00 remains to be paid.

2. That at the time of said sale the Warrant Agent publicly read, in the presence of Robert Gould, the notice of sale, copy of which is attached to defendant Walkers' Answer and Counter-claim and marked "Defendant's Exhibit 3, Pages 1, 2 and 3", and further announced publicly, but without explanation, that warehouse receipts for seven (7) barrels of whiskey had been withdrawn from the sale.

3. That he had there present for examination by prospective purchasers, the warehouse receipts, stock certificates and warrant or warrants above referred to, as well as an itemized statement of the Walker Companies of the exact amount unpaid under their warrants computed to October 1, 1940.

4. That the notice of sale fixed an upset price for all of the items included in the sale at Thirty Thousand Dollars; that Robert Gould had arranged to be present at the sale and had caused his office in Cincinnati, Ohio, to send on to said Warrant Agent, Three Thousand Dollars (one-tenth of the upset price); that Robert Gould was unable to arrive at the place of sale at the time set; namely, 10:00 a.m. and the Warrant Agent, knowing that he intended to be present, had delayed the sale until Gould arrived at about 10:30 a.m.; that upon the arrival of Gould, he, Gould, examined the Warehouse Receipts, stock certificates

and warrants and the statement of the Walker Companies as to the balance due them under their warrants, and announced that he was willing to bid thereon, but that he made as a condition of his bid, the requirement that the endorsements of Pennsylvania Whiskey Distributing Corporation, appearing on the back of said warehouse receipts and stock certificates be "Bank guaranteed," which condition was agreed to. And that at such sale all of the items were bid in by the said Robert Gould and sold to him by said Warrant Agent for the sum of Thirty Thousand Dollars ($30,000.00) and he then arranged with said Warrant Agent to complete the payment of the balance of the purchase price, namely, Twenty-seven Thousand Dollars ($27,000.00) on the following day, September 20, 1940, in the office of the Bank of Manhattan, 40 Wall Street, New York.

5. That the payment of said balance was completed in the following manner: Gould had arranged to borrow from his bank, The 5th-3rd Union Trust Company, of Cincinnati, Ohio, the sum of Twenty-seven Thousand Dollars ($27,000.00) on the security of said warehouse receipts. The bank had arranged with the Bank of Manhattan of New York, as its agent, to pay out for the account of Robert Gould said Twenty-Seven Thousand Dollars ($27,000.00), upon delivery to it, as agent for The 5th-3rd Union Trust Company of Cincinnati, Ohio, said warehouse receipts duly endorsed, with signatures bank guaranteed for negotiation. And in accordance with such arrangements, on September 20, 1940 Mr. Gould and the said W. P. W. Haff met at the offices of the Bank of Manhattan in New York and the said Haff delivered to said Bank of Manhattan in New York said warehouse receipts, and to the said Gould said Hiram Walker warrants and said Commonwealth and Southern Stock certificate in exchange for

Twenty-seven Thousand Dollars ($27,000.00) received from The Bank of Manhattan.

6. That on the following day, September 21, 1940, Gould, accompanied by the General Manager of Pennsylvania Whiskey Distributing Corporation went to the office of the Walker Companies in New York City, and the manager of said Pennsylvania Whiskey Distributing Corporation informed said Walker Companies that Gould had at the aforesaid sale purchased all said Walker Warehouse Receipts and Walker warrants, and he, Gould, was the lawful owner thereof, and Gould offered to pay the balance due said Walker Companies on their warrants and directed them to make out new warehouse receipts in his name, not only for the old warehouse receipts, but also for all the whiskey represented by their warrants, the same to be delivered to him in exchange for the warehouse receipts, warrants and balance due the Walker Companies. And the Walker Companies thereupon agreed to do so but stated that it would take some little time to prepare the new warehouse receipts, since the same entailed considerable clerical work and would have to be done at their Walkerville offices.

7. That several days thereafter, the Walker Companies first began to receive notices or correspondence from several persons who contended that they had some interest in some of the whiskey represented, either by the warehouse receipts or the warrants sold at the aforesaid sale, and as a result of such notices, the Walker Companies refused to deliver the new warehouse receipts until the rights of such claimants, if any, had been determined, which resulted in Gould's bringing this suit, and the Walker Companies filing their counter claim bringing in the new Counter-Defendants.

8. That the warehouse receipts sold by said Warrant Agent to the said Gould are in form (except for the en-

dorsement of Robert Gould) as set forth in the exhibit marked for identification "Gould's Exhibit A, pages 1 and 2", attached to Gould's Answer filed herein; and the Walker warrants sold to the said Gould at said Warrant Agent's sale are in the form of the copy attached to said Gould's Answer herein, marked for identification "Gould's Exhibit B, Pages 1 and 2."

9. That at no time prior to the completion of Gould's purchase at said Warrant Agent's sale, or prior to Gould's notice to the Walker Companies of his purchase of said warehouse receipts and warrants, and their acceptance of him as the purchaser and owner thereof, did either the Walker Companies or the said Robert Gould have any notice or knowledge of any rights or claims of any of the Counter-Defendants herein, unless, as a matter of law, the statements contained in the Warrant Agent's Notice of Sale he held to be notice to Gould thereof.

10. That Gould is, and was engaged in the business of brokering whiskey warehouse receipts and had on several occasions prior to said Warrant Agent's Sale, purchased Warehouse Receipts from Pennsylvania Whiskey Distributing Corporation and there had been no difficulties or complaints as to the legality or regularity of Pennsylvania Whiskey Distributing Corporation's title, or the regularity of those transactions.

11. That the claims of all of the Counter Defendants are based upon the following circumstances:

a. Over a period of several years preceding September, 1940, Pennsylvania Whiskey Distributing Corporation had purchased whiskey from the Walker Companies, receiving as evidence of title therefor negotiable warehouse receipts issued to it by Hiram Walker & Sons, Inc., and during said same period of time it had been contracting to purchase from said Walker Companies, on a payment plan, additional whiskey under contracts or warrants in form similar

~~gauge his bid accordingly.~~ ~~The only investigation which~~

to the warrant attached to Gould's Answer and marked "Gould's Exhibit B – Pages 1 and 2". The warehouse receipts referred to specified barrels of whiskey in the warehouse of Hiram Walker & Sons, Inc., by serial number; after Pennsylvania Whiskey Distributing Corporation had entered into a contract with the Walker Companies for purchase on a payment plan (such as set forth in "Gould's Exhibit B, Pages 1 and 2"), the Walker Companies set aside, in their warehouses, certain barrels of whiskey for said contract or warrant, and furnished to the Pennsylvania Whiskey Distributing Corporation a list of the serial numbers of the barrels so set aside for said warrant; the barrels of whiskey, however, represented by the warehouse receipts and the barrels of whiskey ear-marked for the warrants all remained in the warehouses of the Walker Companies.

b. Pennsylvania Whiskey Distributing Company thereupon entered into a course of dealings with numerous tavern owners in the State of New York, whereby it issued and sold to such tavern-keepers its so-called whiskey certificates, in form as set forth attached to Walker's Answer and Counter-Claim marked "Defendant's Exhibit 1" (although in some instances at the beginning of the second line of the certificate the words "and owned by us and" were stricken out). In many instances said certificates identified by serial number barrels of Hiram Walker whiskey covered by Hiram Walker warehouse receipts; in other instances, they identified by serial number barrels of Hiram Walker whiskey which had been set aside by the Walker Companies for the fulfillment of the aforesaid time payment warrants, and in some instances, the certificates contained no serial numbers but only the words in that space "In Bond". In general said certificates were sold to said tavern-keepers on a time payment plan. The interpleaded Counter-Defendants are those tavern-keepers

12. Neither Gould nor the Walker Companies knew anything whatever about the foregoing course of dealings of Pennsylvania Whiskey Distributing Corporation with tavern-keepers until it was discovered by the Walker Companies several days after they had commenced to make up the new warehouse receipts for Gould, and then only as the result of an investigation suggested by the claims presented to the Walker Companies, as aforesaid, after they had recognized Gould as purchaser and owner of their warehouse receipts and warrants.

13. That all of the whiskey involved in this suit is in the possession of the Walker Companies and subject to the jurisdiction of this Court.

14. That the Walker Warehouse receipts are legal in form and duly endorsed as negotiable instruments. That the Walker warrants are legal in form, and, that neither the warrants nor warehouse receipts have any notation or endorsement thereon indicating any interest of any counter-defendant.

15. That Pennsylvania Whiskey Distributing Corporation kept records in which were recorded the names and addresses of the inter-pleaded Counter-Defendants, and the fact that certificates had been issued to them by Pennsylvania Whiskey Distributing Corporation, and disclosed the payments which had been made by the Counter-Defendants on account thereof, but that at the time of the Warrant Agent's sale in Brooklyn, New York, those records were in the possession of the New York State Tax Commission in Albany, about 150 miles distant from the place of sale.

16. That the Warrant Agent's sale was held at Room 41, 4320 Schermerhorn St., Borough of Brooklyn, City of New York, N. Y., on September 19, 1940.

CONCLUSIONS OF LAW.

The Court holds as a matter of law:

1. That the Warrant Agent's notice of sale did not give prospective purchasers notice of the rights or claims, or alleged or pretended rights or claims of the Counter-Defendants, or any or either of them.

2. That the Warrant Agent's notice of sale did not constitute such a warning of possible claims of a nature, such as have been asserted by the Counter-Defendants herein, as to place upon a reasonable man any duty of making inquiry of any one other than the Walker Companies.

3. That the announcement by the Warrant Agent at the commencement of the sale that warehouse receipts, representing seven (7) barrels of whiskey, had been withdrawn from sale, did not constitute notice, or warning of possible adverse claims, sufficient to put a reasonable man under the duty of making inquiry as to the reason therefor, or as to possible claims of a nature such as that contended by the Counter-Defendants.

4. That Robert Gould, in purchasing the Hiram Walker Warehouse Receipts and Warrants at the Warrant Agent's sale, was an actual bona fide purchaser thereof for value and without notice of any claims of any of the Counter-Defendants

5. That the Counter-Defendants by their failure to ascertain whether negotiable warehouse receipts had been issued to evidence title to the whiskey in the Walker warehouses (which they thought they had purchased) or to ascertain who was the actual owner of said whiskey, and in failing to notify the parties having the physical possession of said whiskey, namely: the Walker Companies, of their claimed rights therein, prior to the Warrant Agent's sale, are estopped from asserting any claim equal to, or superior to the right of Robert Gould.

6. That the equities of this cause are with the said Robert Gould.

7. That this being an interpleader action the res in the possession of the court, i.e., the whiskey involved in this suit is, in the first instance, liable for the payment of all costs herein, including a reasonable sum to compensate the Walker Companies for the fees of their attorneys, necessarily incurred in this proceedings, and that the sum of $1.50 per barrel is a reasonable sum to be allowed to the Walker Companies in full to cover both the costs in this proceedings and their attorneys' fees.

8. That the Walker Companies, and the said Robert Gould, are entitled to a permanent injunction restraining each and every of the Counter-Defendants from asserting any claim or commencing or prosecuting any suit, either at law or in equity, in any Court against the said Hiram Walker & Sons, Inc., the said Hiram Walker Incorporated, or the said Robert Gould, or their or his successors or assigns, for and on account of any of the whiskey involved in this suit, or on account of any alleged or pretended lien, claim, interest, equity or title in and to any part thereof.

9. That the said Robert Gould is entitled to have and receive possession from the Walker Companies of each and every barrel of whiskey involved in this suit upon his surrender and deliver-up to them of the Hiram Walker & Sons, Inc., negotiable warehouse receipts, the surrender and delivery-up to Hiram Walker Incorporated, or its warrants, and the payment to them of the unpaid balance of purchase price due thereon under the terms of said warrants and their proper charges, including $1.50 per barrel for their court costs and attorneys' fees in this proceedings.

10. That the said Robert Gould is entitled to recover of the Counter-Defendants now remaining in this suit, namely the Counter-Defendants who filed Amended An-

swers herein, all costs taxed against the res involved in this suit, namely, $1.50 times 1,861 barrels, or $2,791.50, but that each such Counter-Defendant should pay only his or her equitable proportion thereof and therefore that the said Robert Gould is entitled to have judgment against each Counter-Defendant who filed an Amended Answer herein, for a sum which shall be determined by multiplying $2,791.50 by a fraction, the numerator of which is the number of barrels claimed by said Counter-Defendant in his Amended Answer, and the denominator of which is the total of all barrels of whiskey claimed in all the Amended Answers of Counter-Defendants (Robert Gould excluded) filed herein, which proportion the Court finds is the equitable share of the costs herein to be paid by each Counter-Defendant, and that Robert Gould is entitled to have execution therefor.

Dated at Peoria, Illinois, this 9th day of March, A.D. 1943.

J. LEROY ADAIR /s/
U. S. District Judge

EXHIBIT "D"

DISTRICT COURT OF THE UNITED STATES
Southern District of Illinois, Northern Division

DECREE
(Filed April 14, 1943.)

This cause having come on for trial before the Court without a jury upon the pleadings herein and the evidence

introduced by the parties, and the Court having heard the testimony of witnesses duly sworn in open court, and having examined the evidence, deposition and stipulation introduced herein, and having heard the argument of counsel (the respective parties having appeared by their respective counsel), and having filed herein on the 9th day of March, 1943, the Court's Findings of Fact and Conclusions of Law, now, therefore:

It is hereby ordered, adjudged and decreed by the Court as follows:

(a) That each and every of the following named counter-defendants, namely:

(Naming upwards of 100 persons)

and any and all other counter-defendants yet remaining in this cause, if any, whether herein expressly named or not, and all persons, firms and corporations claiming by, through or under them, or any or either of them since the commencement of this suit, be and they are hereby each severally permanently and perpetually enjoined and restrained from asserting any claim or commencing or prosecuting any action at law, or suit in equity against the said Hiram Walker & Sons, Inc., the said Hiram Walker Incorporated, or the said Robert Gould, or any or either of them, or against his, or their heirs, executors, administrators, successors or assigns, for, or on account of any of the whiskey involved in this proceedings, or on account of any alleged or pretended claim, interest, title, equity or lien in, or to, any part thereof.

(b) That the said Hiram Walker & Sons, Inc. and the said Hiram Walker Incorporated forthwith surrender and deliver up to the said Robert Gould each and every barrel of whiskey involved in this suit upon his surrender and delivery up to them of the negotiable warehouse receipts of Hiram Walker & Sons, Inc. now outstanding

against such of said barrels of whiskey as are represented by Hiram Walker &Sons Inc. warehouse receipts, and the payment to them of the unpaid balance of purchase price due on the warrant barrels, in accordance with the terms of said warrants, and their proper charges including the sum of $1.50 per barrel to reimburse said Walker Companies for all court costs and their attorneys' fees in this proceedings; and more particularly but not in limitation of the foregoing, that upon the said Robert Gould complying with said conditions, said Hiram Walker & Sons, Inc. deliver up to him the following described barrels of Hiram Walker Whiskey distilled by Hiram Walker & Sons Inc. at Peoria, Illinois, (negotiable warehouse receipts issued by Hiram Walker & Sons Inc. being now outstanding) bearing serial numbers as follows:

(The serial numbers of the barrels are listed.)

And the following described barrels of whiskey distilled by Hiram Walker & Sons, Inc. at Peoria, Illinois, (being warrant barrels against which negotiable warehouse receipts of Hiram Walker & Sons have not been issued) bearing serial numbers as follows:

(The serial numbers of the barrels are listed.)

(c) That delivery of all, or any of the above listed barrels of whiskey may be made to the said Robert Gould by the issuance and delivery to him of negotiable warehouse receipts, to be issued by Hiram Walker & Sons, Inc. That the said Robert Gould be, and he is hereby authorized to take delivery of said barrels of whiskey in two or more lots, if he so desires, by the payment of only the amount due on the barrels comprising the lot for which delivery at the time is requested, and the delivery of the documents pertaining thereto.

(d) That if the said Robert Gould, or the said Hiram Walker & Sons, Inc. and the said Hiram Walker Incorporated shall not within fifteen (15) days of this date agree as to the proper amounts due to said Walker Companies on account of the whiskey involved in this proceedings, they, or either of them, may apply to this Court to settle and fix such amounts.

(e) That the counter-claimants, Hiram Walker & Sons, Inc. and Hiram Walker Incorporated, pay all costs of this proceedings (the sum of $1.50 per barrel which they were hereinbefore authorized to add to the amount due them being reimbursement in full for such costs as well as their attorneys' fees).

(f) That the counter-claimant Harry Kramer, doing business as "Ye Olde Chop House" take nothing by his counter-claim against the said Robert Gould, and that the said Robert Gould have judgment in bar of the cause of action of the said Harry Kramer.

(g) That the said Robert Gould (in reimbursement of the costs and attorneys' fees at the rate of $1.50 per barrel charged against said whiskey) have judgment for costs against the counter-defendants hereinafter listed, in the amounts indicated, and that execution issue in his favor thereon, as follows:

(List of counter-defendants against whom Gould was given judgment for pro rata portion of costs and attorneys' fees.)

Enter: This 14th day of April, 1943

J. LEROY ADAIR (s)
District Judge

FILE COPY

Supreme Court, U.S.
FILED

REPLY TO PETITION FOR A WRIT OF CERTIORARI

FILE COPY

Supreme Court, U.S.
FILED
AUG 26 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 250

ROBERT GOULD, d/b/a ROBERT GOULD COMPANY,
Petitioner,

v.

IRVING H. LAKE, ROSARIO BARONE, THOMAS BEACHY, ET AL.,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

The statement by Petitioner, hereinafter called "Gould", of the questions presented is based on the premise that "the measure of damages applied by the District Court and affirmed by the Court of Appeals (after deducting fixed charges) was the market ceiling price fixed by law (O.P.A.) of whiskey in bottles prevailing in April 1944 when Gould took possession of the whiskey in barrels".

However, the premise on which Gould based his question is a false one because the Court of Appeals stated the basis for damages differently. That Court, after first pointing out that bulk whiskey was not available on the market in 1943 and that the Respondents, hereinafter called "Tavern Keepers", could not have purchased other whiskey in bulk and had it bottled, said: (266 F. 2d 249-251, 2, p. 4a Pet.)

> "The District Judge made no allowance for profit and based damages only on the differences between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, charges, etc., paid."

The Court of Appeals further said: (266 F. 2d, 249-254, p. 9a Pet.)

> "It appears to us that the District Court in the case before us gave Judgment for no more than the full actual loss shown."

STATEMENT OF THE CASE.

The Petitioner, Gould, omitted to state in his "Statement of the Case" that for sometime subsequent to April 1943, when he took possession of the whiskey owned by the Tavern Keepers under the erroneous Decree of the District Court, the Tavern Keepers could not have purchased other whiskey in bulk and had it bottled for their tavern business. The Court of Appeals explained the reason for this inability and then said: (266 F. 2d 249-251, p. 4a Pet.)

> "Thus, the Tavern Keepers could not have purchased other whiskey in bulk in 1943 and had it bottled. They would have had to buy bottled whiskey at the higher prices then in effect."

In his statement Gould said that "The measure of damages applied by the District Court and affirmed by the Court of Appeals (after deducting the fixed charges) was the O.P.A. Market Ceiling Price of whiskey in bottles prevailing at the time Gould took possession and control of the whiskey in barrels (in April 1943)." As we pointed out under the heading "Questions Presented" the Appeals Court stated the basis for damages as follows: (266 F. 2d 249-251, 2 p. 4a Pet.)

> "The District Judge * * * based damages only on the differences between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, charges, etc., paid."

REASONS WHY WRIT SHOULD NOT BE GRANTED.

Gould contends that the Writ of Certiorari should be issued for three reasons.

I.

Gould's first contention is that the Court of Appeals has failed to follow the law of the State of Illinois in a diversity case.

There is nothing in the Order of the District Court, or the Opinion of the Court of Appeals to indicate that either Court failed to follow Illinois law in deciding this case. The basic question before the Court of Appeals was the measure of the Tavern Keepers' damages caused by Gould's taking the whiskey before the appeal period expired in reliance on the erroneous decision of the District Court in April 1943. The Court of Appeals answered this question by stating: (260 F. 2d 249, 253—p. 8a Pet.)

> "One whose property is taken under a court order is entitled to restitution if the order is later reversed. Having sold the property erroneously awarded him, Gould must account for its value. *The Bank of the United States* v. *The Bank of Washington*, (1832) 31 U.S. 8; *Ure* v. *Ure*, (1906) 223 Ill. 454; *Hayes* v. *Cassell*, (1873) 70 Ill. 669."

It will be noted that the Court of Appeals cited two Illinois cases in support of this statement. No where in the Petition for Certiorari does Gould contend that the Illinois cases cited by the Court do not support the rule which the Court adopted nor does the Petition state that said cases are not the law of Illinois.

Beginning on page 11 and ending on page 13 of the Petition Gould discusses the case of *National Bank of the Republic* v. *Wells-Jackson Corp., et al.*, 358 Ill. 356, 193 N.E. 215, and for the purpose of pointing out the Illinois Rule of Damages applicable to this case he italicizes the following language from that decision:

> "The measure of damages for conversion of personal property is the value of the property at the time of conversion".

This is precisely the rule laid down by the Court of Appeals in its opinion, (262 F. 2d 249, 253—p. 8a Pet.), where the Court states:

> "Having sold the property erroneously awarded him, Gould must account for its value."

The rule adopted by the Court is the same rule advocated by Gould, and what Gould is actually objecting to is the manner in which the rule is applied in this case. The Court of Appeals held that, because the Tavern Keepers could not have purchased other whiskey in bulk and had it bottled, the value of the bulk whiskey to the Tavern Keepers and the damages they suffered was "the difference between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, charges, etc., paid". (266 F. 2d 249, 251-2—p. 4a Pet.).

The Appeals Court correctly applied the Illinois law to the facts in this case. It was conceded that the Tavern Keepers were in the business of selling whiskey at retail in bottles; and that because of the whiskey shortage in 1943 and the difference in the O.P.A. Ceiling Prices of

bulk whiskey and bottled whiskey the Tavern Keepers could not have replaced their bulk whiskey and had it bottled, but would have had to buy bottled whiskey from a wholesaler. Consequently, the question before the District and Appeals Court was the value of the bulk whiskey to the Tavern Keepers—what each lost by reason of Gould's taking it.

In making an analysis of such value in explanation of the Lower Court's Conclusion, we will center our attention on a single barrel of whiskey, Serial Number 405,699, owned by the Tavern Keeper Harry Kramer. See agreed schedule in Vol. II, R. 37, third line from the bottom, and the Stipulation with respect thereto, the agreed explanations of the columns in the schedules and the agreed computations. (Vol. II, R. 25, 27, 28, 29, 31). This Stipulation, Schedules and the Agreed Computations (Vol. II, R. 31) with respect to Mr. Kramer's said barrel of whiskey, shows the following in tabulation form:

April 1943 market value, O.P.A. Ceiling Price of the barrel of whiskey in bulk form before deducting any storage charges (Col. 10, Vol. II, R. 37)	$ 103.84
Such value and price after deducting accumulated charges (Col. 12, Vol. II, R. 37)	90.51
The computations show that after this barrel of whiskey was put in bottled form, with Federal taxes paid, the wholesale price or cost to a retailer would be (3rd from last figure Vol. II, R. 31)	486.39
The cost to Mr. Kramer of having his own whiskey put in bottles with Federal taxes paid (Vol. II, R. 31)	271.10
The difference between what it would have cost Mr. Kramer to have put his own whiskey	

in bottled form with taxes paid and what it would have cost him to buy the same kind of whiskey in bottles with taxes paid from a wholesaler (last figure said page 31)	215.29
Wholesale price of Mr. Kramer's whiskey in bottles after deducting all charges, taxes and costs of bottling	215.29
O.P.A. Ceiling Price of Mr. Kramer's barrel of whiskey in bulk form before bottling with storage charges paid (Col. 12, Vol. II, R. 37)	90.51
Difference between net value of the whiskey in bulk form and its net value in bottles	124.78

This figure of $124.78 shows why it was impossible to buy bulk whiskey in 1943 under O.P.A. price structures.

Since Mr. Kramer's whiskey was taken by Gould in 1943 and since no bulk was available, a barrel of whiskey like his in bottled form with all taxes, costs and charges paid, would have cost him (third from last figure Vol. II, R. 31)	$ 486.39
But if Mr. Kramer had been permitted to take his whiskey in 1943 it would only have cost him to have had it in bottles with all taxes, costs and charges paid, (next to last figure Vol. II, R. 31)	271.10
What Mr. Kramer lost by reason of Gould taking his irreplaceable barrel of bulk whiskey was $486.39 minus $271.10 or	215.29

which is what both the District Court and the Court of Appeals allowed him.

Under the law of this case each Tavern Keeper is entitled to what he lost by virtue of the erroneous decree—

the value to him of what was taken. With respect to Mr. Kramer's barrel of whiskey, in the above illustration, it would have cost him $486.39 to purchase from a wholesaler that barrel of whiskey in bottles with all taxes and charges paid. It was stipulated that $486.39 is the market value or cost to a retailer of one barrel of whiskey in bottles. If Gould had not taken that whiskey, the Tavern Keeper, Kramer, by paying out $271.10 to a Distillery for Government Taxes, storage charges and bottling costs, would have had the same identical thing for which he would have to pay a wholesaler the sum of $486.39. The difference between those two figures is $215.29 and that is what the District Court and the Court of Appeals held was the value to Mr. Kramer of his barrel of whiskey.

If Gould had not taken his barrel of whiskey the Tavern Keeper, in order to get it in bottles would have had to pay out $271.10. But, since Gould took his whiskey he would have to pay out $486.39 to get exactly the same thing.

Thus, it will be seen that instead of assessing damages on the basis of the market value of a barrel of whiskey in bottles, the District Court, as stated by the Court of Appeals, "based damages only on the difference between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, charges, etc., paid." Such "differences" necessarily represent the cost to a retailer of a barrel of whiskey in bottles, less the sum of $271.10 for storage, insurance, bottling costs and excise taxes. But it does not follow that damages were based on the market value of bottled whiskey as asserted by Petitioner.

In his Petition Gould cited a number of Illinois decisions for the proposition that in the case of a conversion the measure of damages is the market value of the property converted at the time of conversion, plus interest. That is, of course, a part of the general rule of damages with respect to conversion cases. But it is not the rule when the thing converted is irreplaceable. The market value of the irreplaceable commodity taken, in such a case, would not be compensatory and the measure of damages is the value to the owner of the irreplaceable commodity.

The general rule with respect to damages in a case like this is well stated in American Law Institute's Restatement of the Law of Torts, Volume IV, page 647, Chapter 47, Damages, Section 927, where it was stated:

> "Where a person is entitled to a judgment for the conversion of a chattel or the destruction of any legally protected interest in land or other thing the damages include
>
> "(a) the exchange value of the subject matter or the plaintiff's interest therein at the time and place of the conversion or destruction, or a different value where that is necessary to give just compensation, and
>
> "(b) the amount of any further loss suffered as the result of the deprivation, and
>
> "(c) interest from the time at which the value is fixed or compensation for the loss of use."

And on page 649 of the same Volume it was stated:

> "A person tortuously deprived of property is entitled to damages based upon its special value to him if that is greater than its market value."

That is also the rule in Illinois. Thus, in the case of *Head* v. *Becklenberg*, 116 Ill. App. 576, which was an action for the conversion of used clothing and household goods, the Lower Court refused to instruct the jury that plaintiff

was entitled to recover "the amount shown by the evidence to be the market value of the goods *to the plaintiff*, and that the plaintiff is not restricted to recover only the value of the goods as second-hand goods." In commenting on such instruction the Illinois Court said: (page 580)

> "In an action for the unlawful conversion of chattels, if the articles can justly be said to have had a market price, if the price at which they could have been sold and the price at which other articles equally useful to the owner of the chattels could have been bought at the time and place of such conversion can be shown, then such market value must control. But clothing and household goods which have been worn and used cannot in all cases be said to have a market price and will not sell as second-hand goods for what they are really worth to the owner, and in such case in order to give the owner compensation for damage sustained he must be permitted to recover the actual value of such articles."

In *Hays* v. *Cassell*, 70 Ill. 669, the case cited by the Court of Appeals in its Opinion, it was said:

> "The effect of a judgment of reversal is to restore the defendant to all he may have lost by reason of the erroneous judgment, if title to the property has not passed, by the execution of the judgment to a third party. In such case he would have an action against the plaintiff to recover full damages."

Gould is attempting to have applied to this case the strict and ordinary rule as to the measure of damages in an ordinary conversion case, where the thing converted is replaceable and where its market value would be compensatory, and to have the exception to such rule, which applies where the thing converted is not replaceable and where its market value would not be compensatory, ignored. However, not only does this case come within the general exception to the rule but it is not a true conversion case.

In a conversion case interest is also allowed according to the Illinois cases cited by Gould. But, when we contended that interest should be awarded as a part of the damages Gould argued that this was not a case of conversion. The Appeals Court said: (266 F. 2d 249, 254, p. 9a Pet.)

> "Gould contends that the Tavern Keepers are not entitled to interest under the Illinois Interest Act because of the unliquidated nature of their claims and because this is not a true case of conversion as the Tavern Keepers had no immediate right to possession because of the Federal Bottling Requirements."

Thus, Gould in one breath contends that this is a conversion case for the purpose of assessing damages on the basis the market value of the commodity taken, even though it is irreplaceable, and in another breath contends that damages should not include interest because this is not a true case of conversion.

II.

Gould's second reason for granting the Writ is stated as follows:

> "The reason why Certiorari was granted in *Erie v. Tompkins* is the reason why Certiorari should be granted in this case."

In *Erie R. Co. v. Tompkins*, (1938) 304 U.S. 64, a trespasser was injured by the railroad while on the railroad right-of-way. The question before the Court was the nature of the duty which the railroad owed to a trespasser. The trial court and the circuit court of appeals specifically held that it was unnecessary to consider the law of Pennsylvania and said:

> "Upon questions of general law the Federal Courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is;" 304 U.S. 70.

This Court in its Opinion in that case cited as its reason for granting certiorari the following: (304 U.S. 71)

> "Because of the importance of the question whether the Federal Court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, Ante 518, 58 S. Ct. 50."

The foregoing language clearly indicates that this Court granted certiorari in that case to clear up the confusion which existed over the question of whether the Federal Courts were bound to apply the common law of the States. There is nothing in the Record in the case at bar to indicate that any of the litigants ever contended that the Trial Court, or the Court of Appeals, could or should apply any law other than the law of Illinois in adjudicating this case. The Petition itself indicates that Gould is not raising the question of whether the Court should apply State or Federal law, which was the issue in the *Tompkins* case. Instead, Gould is attempting to get a review on the theory that the Court of Appeals misinterpreted or misapplied the Illinois law in this case. In doing so he does not discuss the Illinois cases cited by the Court; he cites new cases for the first time and advocates a theory of damages which would be applicable to ordinary conversion cases and which he argued against in the Court of Appeals.

III.

The third reason cited by Gould for granting certiorari is that the decision below sanctions

> "a price for whiskey in barrels which, when related back to April 1943 is higher than the then legally permitted price for same."

For the same reason that the basis for damages in this case is not the market value of a barrel of whiskey in bottles, but is the loss suffered by the Tavern Keepers, the decision of the Court of Appeals did not sanction a violation of the O.P.A. price structure.

CONCLUSION.

Gould requests that the Writ be granted because the measure of damages applied by the District Court and affirmed by the Court of Appeals was the market price of bottled whiskey when Gould took possession of bulk whiskey, contrary to the Illinois law in a diversity case. He contends that the proper measure of damages was the market price of bulk whiskey.

Damages based on the market value of bulk whiskey would not be compensatory in this case because bulk whiskey could not be purchased on the market. Furthermore, damages were not based on the market value of bottled whiskey. They were based only on the difference between what it would have cost each Tavern Keeper to obtain a barrel of whiskey in bottled form (with taxes and charges paid) and what it would have cost him to get his own whiskey, of which Gould had taken possession, in bottled form with all taxes, contract balances, and charges paid. Such measure of damages is in accordance with the Illinois law in a case where the commodity taken cannot be replaced.

Furthermore, the Circuit Court of Appeals cited Illinois cases in support of its decision. It did not apply its own rule or the rule of another State. It sanctioned the measure of damages in accordance with its interpretation of Illinois law.

It is submitted that this case does not fall within any of the provisions of Rule 19 of this Court, *viz.*:

1. The Record does not indicate any conflict of law between circuits.

2. It does not appear that the Court has decided an important State law question in conflict with a State Court ruling.

3. No question of Federal law is involved nor is there any conflict with any decision of this Court.

4. The questions involved are of little value as legal precedent because of the unusual facts involved in this case.

We respectfully submit that for the foregoing reasons the Petition for Writ of Certiorari should be denied.

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PETITIONER'S RESPONSE TO RESPONDENTS' BRIEF (DESIGNATED "REPLY") OPPOSING PETITION FOR CERTIORARI

Office-Supreme Court, U.S.
FILED
SEP 17 1959
JAMES R. BROWNING, Clerk

No. 230

In The

Supreme Court of the United States

October Term, 1959

ROBERT GOULD, d/b/a ROBERT GOULD COMPANY,

Petitioner,

IRVING H. LAKE, ROSARIO BARONE, THOMAS BEACHY, ET ALII,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENTS' BRIEF (DESIGNATED "REPLY") OPPOSING PETITION FOR CERTIORARI

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In The

Supreme Court of The United States

October Term, 1959

No. 250

ROBERT GOULD, d/b/a ROBERT GOULD COMPANY,

Petitioner,

v.

IRVING H. LAKE, ROSARIO BARONE, THOMAS BEACHY, ET ALII

Respondents.

PETITIONER'S RESPONSE TO RESPONDENTS' BRIEF (CALLED "REPLY") OPPOSING CERTIORARI

FOREWORD

Respondents' brief (designated "Reply") in opposition to the Petition for Certiorari is sufficiently short to enable this brief response to take the form of direct comment thereon (with page references) without reference to sub-headings as such.

PETITIONER'S RESPONSE

On pages 1-2 of their "reply" to the Petition for certiorari, Respondents deny the correctness of Petitioner's premise that the measure of damages (applied and affirmed by the Courts below) was the O.P.A. ceiling price for whiskey in *bottles* (less fixed charges) prevailing in April 1943*

*Respondents' brief says "1944" but "1943" is correct (Vol. II, R. 23, par. 1).

when Petitioner took possession of the whiskey in *barrels*. In so doing, Respondents have seemingly overlooked these passages in the Opinion of the Court of Appeals (page 3 A. Appendix to Petition; 266 Fed. (2) 249 (251)):

> "Damages were assessed by the District Court on the basis of the wholesale value of each barrel of whiskey in *bottled* form less (fixed-charges)"

and:

> "In computing the value of each of the barrels in *bottled* form, the District Judge gave full consideration to all these charges . . ."

Respondents have also apparently overlooked the following Conclusion of Law underlying the Decree of the District Court, which says in its pertinent parts (Vol. 1; R. 28-29, par. 4):

> ". . . the proper measure of damages in this case is the market value, as of April 1943, of such counter-defendants' whiskey in *bottles*, less all charges, etc."

On page 3 of their "reply" to the Petition for Certiorari, Respondents create the impression that at the time there mentioned it was *impossible* for Respondents to purchase other whiskey in bulk. They quote an excerpt from the Opinion of the Court of Appeals to strengthen it. The excerpt so quoted should be considered in its context as follows (Page 4 A. Appendix to Petition; 266 Fed. (2) 249 (251):

> "Further, because of the great price differential between O.P.A. "ceilings" for bulk whiskey and bottled whiskey, very *little* whiskey could be purchased in bulk. As a matter of self-interest, owners of bulk whiskey had it bottled before sale to take advantage

of the differential. Thus the tavernkeepers could not have purchased other whiskey in bulk in 1943 and had it bottled. Etc."

This portion of the Court's opinion is patently based upon a *stipulation* of the parties which says in its pertinent parts (Vol. II, R. 24, par. 3):

> "That in April 1943 and for some time prior and subsequent thereto . . . *relatively very little* whiskey could be purchased in bulk . . ."

Thus, while the record shows that it was *difficult* to get bulk whiskey at that time, it hardly supports the conclusion that it was *impossible*.

It seems to Counsel for Petitioner that the argument on pages 4-10 of Respondents' "reply" to the Petition is essentially an attempt to "talk around" the rule of damages in Illinois conversion cases as indicated in *Sturgis* v. *Keith* (1870) Sup. Ct. of Ill.) 57 Ill. 451, 11 Amer. Rpts. 28, to the effect that the vaue of the property at the time of its conversion is the measure of damages in Illinois, notwithstanding a subsequent increase in its value. This is set out on page 14 of the Petition for Certiorari.

On page 11 of their "reply" to the Petition for certiorari, Respondents say that in conversion cases interest is allowed but that when they sought interest against Petitioner, he argued that "this was not a case of conversion". Be that as it may, the important thing is the *Court's* reason for not allowing such interest. It is clear that the Court did not allow interest, not because the case was not one of conversion so far as damages were concerned, but because of inexcusable delay in the case attributed to all parties. This appears from Respondents' motion to amend the District Court's decree to award them interest at 5% for 14 years against Petitioner (Vol. I, R. 62-63) and the

denial of that motion in which the District Court said (Vol. 1, R. 64-65):

> "It must be remembered that this suit was filed on March 20, 1941, more than 16 years ago. There has been inexcusable delay in obtaining a final judicial determination. This court is not in a position and does not desire to place the blame for said delay but ventures the opinion that *all* parties are responsible, etc."

That the Court of Appeals *denied* Petitioner's contention that this was not a true conversion is evident from excerpts from its opinion (pages 7A-8A, Appendix to Petition; 266 Fed. (2) 249 (253):

> "Gould denies that Tavernkeepers had a right to possession on which a claim of conversion can be based citing *British American Tobacco Co. v. Federal Reserve Bank*, 105 F. (2) 935; and *Union Stockyard Co. v. Mallory, etc. Co.*, 157 Ill. 554. *Both are distinguishable.* . . . Having sold the property erroneously awarded him, Gould must account *for its value.*

CONCLUSION

For the reasons set forth in the Petition heretofore filed, it is respectfully submitted that a writ of certiorari should be granted.

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